STATE OF MICHIGAN

COURT OF APPEALS

RYAN STEVENSON,

Plaintiff-Appellant,

v

ANDY'S STATEWIDE HEATING AND COOLING, INC.,

Defendant/Counterdefendant-Appellee,

and

PULTE HOMES OF MICHIGAN CORPORATION, d/b/a PULTE HOMES OF MICHIGAN LIMITED PARTNERSHIP,

Defendant/Counterplaintiff.

UNPUBLISHED
March 16, 2006

No. 257738
Oakland Circuit Court
LC No. 02-038422-NO

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action in favor of defendant, Andy's Statewide Heating and Cooling, Inc., following a jury trial. We affirm.

Defendant was the heating and cooling subcontractor for a condominium construction project managed by Pulte Homes of Michigan Corporation.[1] Plaintiff's employer was the drywalling subcontractor. Plaintiff was finishing the upper sections of drywall in a closet when he stepped into a hole or weak spot in the floor with his drywalling stilt. He fell and allegedly injured his wrist.

Plaintiff presented no objective evidence of the condition of the hole at the time of his fall. He alleged in his complaint and in answer to interrogatories that it was an "open hole." At

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[1] Plaintiff voluntarily dismissed Pulte without prejudice before trial.

trial, however, he claimed that the hole had been inadequately repaired, so that the floor looked sound, but in fact was too weak to support his weight.

The jury returned a special verdict in which it found that defendant was negligent, but that its negligence was not the proximate cause of plaintiff's injuries. The trial court entered a judgment of no cause of action pursuant to the jury's verdict. Plaintiff moved for a new trial, arguing that the jury's verdict was illogical and against the great weight of the evidence. The trial court denied plaintiff's motion, holding that there were numerous ways the jury could find no proximate cause, consistent with its finding of negligence:

> I can think of, offhand, five instances where the jury could have found negligence in this case and still come up with the verdict that they did. I feel that defense counsel could probably come up with a lot more additional instances of negligence in the evidence other than the five which the Court says come to mind.
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> Example three is that the defendant was negligent in putting the B-vent in the wrong place, but it was a small circular hole, and later on was greatly enlarged to a square hold by somebody else, whether it was patched or not, so the proximate cause was somebody else's fault because perhaps the jury felt that the smaller hole would not have been a proximate cause of the plaintiff's injuries.
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> Then you go to the overall picture, maybe the jury didn't believe the plaintiff and discounted everything the plaintiff said. Like not seeing – for example, not seeing the hole beforehand. Maybe they thought the plaintiff saw the hole and, you know, worked around it and said I'm just going to avoid it, but stepped into it anyway.
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> So there's a number of situations where the jury could find the defendant was negligent and still not have found a proximate cause between that negligence and the plaintiff's injury, and thus held the way they did. So the court would, on that basis, deny the motion for the new trial.

Plaintiff argues on appeal that the jury's verdict was against the great weight of the evidence and contrary to law, and that the trial court therefore erred in denying his motion for a new trial. We disagree.

A new trial may be granted on some or all issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). But the trial court must not substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The jury and trial court are accorded substantial deference because both are in a better position to determine credibility and weigh the testimony. *Id.* This Court may overturn a jury verdict only when it is manifestly against the clear weight of the evidence. *Id.*

Plaintiff argues that the jury could not have logically found that defendant was negligent, but that its negligence was not the proximate cause of plaintiff's injury. A claim of negligence requires proof of (1) a duty, (2) breach of that duty, (3) proximate cause, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). An intervening cause may relieve a defendant from liability. *Meek v Dep't of Transportation,* 240 Mich App 105, 120; 610 NW2d 250 (2000). An intervening cause is one which actively operates to produce harm to another after the negligence of the defendant. *Id.* An intervening cause is not a superseding cause if it was reasonably foreseeable. *Id.* Where the defendant's negligence enhances the likelihood that an intervening cause would occur or consists of failure to protect the plaintiff against the risk that occurred, the intervening cause is reasonably foreseeable. *Id.* at 120-121.

Plaintiff argues that once the jury found that defendant was negligent, it was logically obligated to find that its negligence was the proximate cause of plaintiff's injuries, because there was no evidence of an intervening cause. We disagree, because as the trial court concluded in its example three, the jury could have found that defendant was negligent, but that another subcontractor's intervening negligence was the proximate cause of plaintiff's accident. Plaintiff's theory was that Pulte changed the location where the furnace was to be installed in the unit where he was injured. Plaintiff contended that defendant began furnace installation work at the original location before realizing that Pulte had modified the plans. However, the evidence did not indicate how much work was done at the original location before the hole for the furnace B-vent was changed. Defendant acknowledged that if it cut a hole in the wrong location, it was responsible for repairing the hole. However, defendant presented evidence that after a B-vent pipe is installed, a carpentry subcontractor builds the chimney chase frame around the pipe. If the structure has to be disassembled and moved, the carpentry subcontractor is responsible for removing the frame, and repairing the hole.

The jury could have found that defendant negligently installed the B-vent at the wrong location, but that a carpentry subcontractor was responsible for removing the frame and then repairing the hole. Indeed, plaintiff described the hole as an eight-by-ten-inch square hole, but defendant's witness testified that defendant only cuts round, eight-inch holes to install B-vents. Defendant's witness also testified that defendant uses metal patches to repair holes, but plaintiff believed that the hole he stepped in was plugged with plywood. This evidence supports an inference, that the jury was free to accept, that the hole that plaintiff fell through was cut by a carpentry subcontractor, not by defendant.

If the jury found that another subcontractor failed to repair the hole after removing the frame, or enlarged the hole while removing the frame, or repaired it in an unsafe manner that made it appear safe, then the other subcontractor's negligence superseded any negligence by defendant. Any of these events would have actively operated to produce an unsafe condition after defendant's negligence, and none of these events were foreseeable to defendant. *Meek, supra* at 120. Defendant's negligence in originally installing the B-vent in the wrong location would not make it more likely that another subcontractor would fail to properly complete its work when moving the chimney chase. *Id.*

Plaintiff relies on *Parks v Starks*, 342 Mich 443; 70 NW2d 805 (1955), to support its argument that another subcontractor's negligence could not be an intervening cause of plaintiff's injury. In *Parks*, the defendant Grant crashed his car into a pillar supporting a canopy over the gasoline pumps at a gas station. *Id.* at 445. The plaintiff notified the owners of the gas station that the premises were unsafe, and that the owner should erect a barricade around the canopy. The owner failed to do so. *Id.* Nine hours later, the canopy collapsed and fell onto the plaintiff while he was warning children to leave the area. *Id.* at 446. Grant argued that his negligence was not the proximate cause of the plaintiff's injuries because the owners' negligence in failing to safeguard the premises was an intervening cause. *Id.* The Supreme Court held that the owners' failure to act was not an overt act that became the efficient cause of the plaintiff's injuries. *Id.* at 446-447. The Court also distinguished cases where another party assumed a duty that would have prevented the injury. *Id.* at 447.

In the instant case, the jury could have found that another subcontractor's conduct in aggravating the unsafe condition by enlarging the hole or concealing the hazard with an inadequate repair was an overt act that efficiently caused plaintiff's injuries. Similarly, if it merely failed to repair the hole after removing the frame around the chase, its negligence would also be an intervening cause because it assumed the duty of repairing the hole as part of the task of removing the frame. Accordingly, *Parks* is distinguishable.

For these reasons, we cannot conclude that there was no competent evidence to support the jury's verdict. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio